FILED

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97 817 SEP - 2 1997

No.

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

RUBEN MARTIN,

Petitioner,

v.

GOODYEAR AUTO SERVICE CENTER,
a Division of the Goodyear Tire and Rubber Company,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court
Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

RUBEN MARTIN
Post Office Box 242
Hopkins, SC 29061
(803) 776-9913

Petitioner

55pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the court of appeals erred by finding no reversible error in various pre-trial orders of the magistrate judge?

II. Whether the court of appeals erred in affirming the order and judgment of the magistrate judge awarding petitioner damages in his negligence suit?

III. Whether the magistrate judge erred by denying to petitioner his right to a jury trial?

IV. Whether the magistrate judge erred in refusing to grant a default judgment against the respondent?

LIST OF ALL PARTIES BELOW

The caption contains the names of all parties to the proceedings in the court of appeals.

TABLE OF CONTENTS

PAGE NO.

QUESTIONS PRESENTED FOR REVIEW i

LIST OF ALL PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED 3

STATEMENT OF CASE 12

REASONS FOR GRANTING WRIT 12

I. THE COURT OF APPEALS SHOULD HAVE DECIDED THAT THE MAGISTRATE JUDGE WAS IN ERROR BY DENYING MY RIGHT TO A JURY TRIAL 12

II. THE COURT OF APPEALS SHOULD HAVE DECIDED THAT THE MAGISTRATE JUDGE WAS IN ERROR BY DENYING MY MOTION FOR DEFAULT JUDGMENT 14

RELIEF REQUESTED 17

APPENDICES

A. Opinions Of The Court Of Appeals . . . . . App. 1a
B. Orders Of The Magistrate Judge . . . . . App. 4a
C. Transcript Of February 15, 1996 Hearing. . . . . App. 14a
D. Acknowledgment Of The Filing Of
Copy Of Notice Of Removal . . . . . App. 29a

TABLE OF AUTHORITIES

CASES — PAGE NO.

Baltimore Transit Co. v. Mezzanotti,
174 A.2d 768, 227 Md.8 (1961) 15

Beacon Theatres, Inc. v. Westover,
359 U. S. 500, 501, 79 S.Ct. 948, 951,
3 L.Ed.2d 988 (1959) 13

Byrd v. Blue Ridge Rural Electric Cooperative, Inc.,
356 U. S. 525, 537-539, 78 S.Ct. 893, 900-901,
2 L.Ed.2d 953 (1958) 12

Colgrove v. Battin, 413 U. S., at 157,
93 S.Ct., at 2453 13

Curtis v. Loether, 415 U. S., at 198,
94 S.Ct., at 1010 13

Dimick v. Scheidt, 293 U. S., at 486,
55 S. Ct., at 301 13

Duncan v. Louisiana, 391 U. S. 145, 156,
88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968) 13

Gasoline Products Co. v. Champlin Co.,
283 U. S. 494, 51 S.Ct. 513, 514, 75 L.Ed. 1188 (1931) 13

Hesse v. Brunner, 172 F.Supp. 284 (D.C.N.Y. 1959) 15

Jacob v. New York, 315 U. S. 752, 752-753,
62 S.Ct. 854, 86 L.Ed. 1166 (1942) 12

Parklane Hosiery Co., Inc. v. Shore,
439 U. S. 322, 346, 99 S.Ct. 546, 658 (1979) 13

Simler v. Conner, 372 U. S. 221, 222,
83 S.Ct. 609, 610, 9 L.Ed.2d 691 (1963) 12

U.S. v. 3963 Bottles, 265 F.2d 332, 337
(C.A. 7th, 1959) 15

*W. W. & W. B. Gardner, Inc. v. Park West
Village, Inc.*, 568 P.2d 734 (1977). 15

U. S. CONSTITUTION:

Article VII 3
Article XIV 3

RULES:

Rule 26(b)(5)(c), Federal Rules of Civil Procedure 3
Rule 33, Federal Rules of Civil Procedure 5
Rule 34, Federal Rules of Civil Procedure 6
Rule 37, Federal Rules of Civil Procedure 8
Rule 38, Federal Rules of Civil Procedure 11

OTHER:

*Federal Practice and Procedure,
Wright-Miller-Marcus Civil* 2d,
Sections 2101 to 2300 Rules 30-37 volume 8a 14

H. Kalven & H. Zeisel, The American Jury 8 (1966) 13

OPINION BELOW

The June 2, 1997, order of the court of appeals denying petitioner's petition for rehearing and suggestion for rehearing in banc is unreported and is reprinted at App. 1a. The orders of the magistrate judge are unreported and are reprinted at App. 4-12a. The verbal orders of the magistrate judge are reprinted at App. 19a, 27a.. The April 24, 1997, opinion of the court of appeals affirming the decisions of the magistrate judge denying petitioner a jury trial, denying the grant of a default judgment against the respondent and awarding petitioner damages in his negligence suit against the respondent is unreported and is reprinted at App. 2a.

JURISDICTION

The opinion of the court of appeals sought to be reviewed was entered on April 24, 1997. Jurisdiction to review on a writ of certiorari the opinion in question is conferred by 28 U.S.C. Section 1254(1). This petition is being filed within 90 days after entry of the order of the court of appeals denying petitioner's petition for rehearing and suggestion for rehearing in banc.

CONSTITUTIONAL PROVISIONS INVOLVED

The Articles of the United States Constitution involved in this case are:

ARTICLE VII. TRIAL BY JURY IN CIVIL CASES.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE XIV, Section 1. Citizenship Rights Not to be Abridged by States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULES INVOLVED

The Federal Rules of Civil Procedure involved in this case are:

Rule 26(b)(5)(c). Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had:

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Rule 33. Interrogatories to Parties

(a) Availability. Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).

(b) Answers and Objections.

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other

failure to answer an interrogatory.

(c) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through

detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produced documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. A person not a party to the action may be compelled to produce documents and things or to submit to an

inspection as provided in Rule 45.

Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions

(a) Motion For Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) ***Appropriate Court.*** An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) ***Motion.***

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the

information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) ***Expenses and Sanctions.***

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the

parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

STATEMENT OF CASE

I appeal from the order of the Fourth Circuit Court of Appeals which upheld various pretrial orders of the Magistrate Court and the very small money judgment which the magistrate judge granted to me as well as that court's refusal to rehear my appeal. The appeals court refused to consider my arguments that I was entitled to a judgment by default against Goodyear because Goodyear refused to answer my interrogatories and ignored the deadline set by the judge. Therefore, I could not adequately prepare to present my case at a trial. Also the appeals court upheld the denial of my right to trial by jury by the magistrate judge.

REASONS FOR GRANTING WRIT

My petition for writ of certiorari should be granted because the Court of Appeals backed up the magistrate judge's denial of my right to a jury trial and his refusal to give me a default judgment against Goodyear to punish them for refusing to answer my interrogatories. My rights to a jury trial and my right to due process and equal protection of the law were violated by the magistrate judge and the Court of Appeals backed him up.

I. THE COURT OF APPEALS SHOULD HAVE DECIDED THAT THE MAGISTRATE JUDGE WAS IN ERROR BY DENYING MY RIGHT TO A JURY TRIAL.

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. New York*, 315 U. S. 752, 752-753, 62 S. Ct. 854, 86 L.Ed. 1166 (1942). Accord, *Simler v. Conner*, 372 U. S. 221, 222, 83 S. Ct. 609,

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Juries can make a difference, and the cases of this Court have recognized this obvious fact. In *Colgrove v. Battin*, 413 U. S., at 157, 93 S.Ct., at 2453, this Court stated that "the purpose of the jury trial in ... civil cases [is] to assure a fair and equitable resolution of the factual issues, *Gasoline Products Co. v. Champlin Co.*, 283 U. S. 494, 51 S. Ct. 513, 514, 75 L.Ed. 1188 (1931)..." And in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, supra, 356 U. S., at 5377, 78 S. Ct., at 900, the Court conceded that "the nature of the tribunal which tries issues may be important in the enforcement of the parcel of rights making up a cause of action or defense ... It may well be that in the instant personal injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury." *See Curtis v. Loether*, 415 U. S., at 198, 94 S.Ct., at 1010; *Cf. Duncan v. Louisiana*, 391 U. S. 145, 156, 88 S. Ct. 1444, 1451, 20 L.Ed.2d 491 (1968). Jurors bring to a case their common sense and community values; their "very inexperience is an asset because it secures a fresh perception of each trial avoiding the stereotypes said to infect the judicial eye." *H. Kalven & H. Zeisel, The American Jury* 8 (1966).

"[A]s with other provisions of the Bill of Rights, the onerous nature of the protection [of the Seventh Amendment] is no license for contracting the rights secured by the amendment. Because '[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence ... any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick v. Scheidt, supra*, 293., at 486, 55 S. Ct., at 301, quoted in *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500, 501, 79 S.Ct. 948, 951, 3 L.Ed.2d 988 (1959)." *Parklane Hosiery Co., Inc. v. Shore*, 439 U. S. 322, 346, 99 S.Ct. 546, 658 (1979).

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The Court of Appeals overlooked that I was denied my constitutional right to a jury trial because the magistrate judge did not examine the record properly to notice that a jury trial had been requested in the right period of time. I believed that I was getting a jury trial in South Carolina state court when I filed my case but since Goodyear had the case moved to federal court, the records of this request did not appear in the files which are in the federal district court. Also, when it moved the case from state court, Goodyear had made a demand for a jury trial, App. 29-30a, which it never withdrew. Because the demand for a jury trial had been made by Goodyear and receipt of the demand acknowledged by the Richland County Clerk of Court and because I was sure I had been scheduled for a jury trial in state court before Goodyear moved the case to federal court, I believed that I was going to get a jury trial. However, on February 15, 1996, the magistrate judge forced me to agree to a nonjury trial because he claimed no jury trial request had been made in time to be able to have one. The judge was wrong to deny my right to a jury trial since demands had been made by both parties and I had not consented to have Goodyear's demand for a jury trial withdrawn under Rule 38(d) of the Federal Rules. Because I was acting alone and did not fully understand my rights to demand a jury trial, I believe the judge took advantage of my ignorance and misled me instead of explaining my rights to assist me with my case. I always insisted upon my right to a jury trial until the judge convinced me that I had no other choice except to sign the papers for a nonjury trial before him. App. 17-22a.

II. THE COURT OF APPEALS SHOULD HAVE DECIDED THAT THE MAGISTRATE JUDGE WAS IN ERROR BY DENYING MY MOTION FOR DEFAULT JUDGMENT.

I filed a motion for judgment by default under Rule 37, Federal Rules of Civil Procedure, based upon Goodyear's refusal to answer my interrogatories within the time fixed by the court. This motion was denied by the magistrate judge. App. 22-28a.

In *Federal Practice and Procedure, Wright-Miller-Marcus Civil 2d*, Sections 2101 to 2300 Rules 30-37 volume 8a, it is stated:

Failure of a defendant to answer interrogatories does not entitle plaintiffs to summary judgment, but plaintiffs may be granted judgment by default if the defendant fails to answer interrogatories within time fixed by court. *Hesse v. Brunner*, 172 F. Supp. 284 (D.C.N.Y. 1959).

Entry of default judgment was proper when defendant had refused to answer interrogatories. *Baltimore Transit Co. v. Mezzanotti*, 174 A.2d 768 (1961).

A willful failure "is any intentional failure as distinguished from involuntary noncompliance. No wrongful intent need be shown." *U. S. v. 3963 Bottles, more or less, etc.*, 265 F.2d 332, 337.

> "The sanction of default judgment is justified where there has been a frustration of the judicial process, viz., where the failure to respond to discovery impedes trial on the merits and makes it impossible to ascertain whether the allegations of the answer have any factual merit." *W. W. & W. B. Gardner, Inc. v. Park West Village, Inc.*, 568 P.2d 734, 738 (1977).
>
> "A defendant may not ignore with impunity the requirements of Rules 33 and 34, and the necessity to respond within thirty days, or to request additional time or to seek a protective order under Rule 26(c). A party to an action has a right to have the benefits of discovery procedure promptly, not only in order that he may have ample time to prepare his case, but also in order to bring to light facts which may entitle him to summary judgment or induce settlement prior to trial. The rules were designed to secure 'the just, speedy and inexpensive determination of every action,' Rule 1." *W. W. & W. B. Gardner, Inc. v. Park West Village, Inc.*, 568 P.2d 734, 738 (1977).

APPENDICES

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RUBEN MARTIN,

Plaintiff-Appellant,

v.

GOODYEAR AUTO SERVICE CENTER, a Division of the Goodyear Tire and Rubber Company,

Defendant-Appellee.

No. 96-2619

FILED
June 2, 1997

CA No. 94-3415-3-17BC

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing is banc are denied.

For the Court,
s/ Patricia S. Connor

Clerk

Order Affirming Orders And Judgment Of The Magistrate Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 96-2619

RUBEN MARTIN,

Plaintiff-Appellant,

v.

GOODYEAR AUTO SERVICE CENTER,
a Division of the Goodyear Tire
and Rubber Company,

Defendant-Appellee.

Appeal from the United States District Court
for the District of South Carolina, at Columbia.
Joseph R. McCrorey, Magistrate Judge.
(CA-94-3415-3-17BC)

Submitted: April 17, 1997
Decided: April 24, 1997

Before NIEMEYER and WILLIAMS, Circuit Judges,
and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.
Ruben Martin, Appellant Pro Se. Frank Barron Grier, III,
GRIER LAW FIRM, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant appeals various pre-trial orders of the magistrate judge. We have reviewed the record and the magistrate judge's order awarding Appellant damages in his negligence suit against the Appellee and find no reversible error. Accordingly, we affirm the orders and judgment of the magistrate judge. Martin v. Goodyear Auto Serv., No. CA-94-3415-3-17BC (D.S.C. Oct. 23, 1996). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

RUBEN MARTIN,

C.A. No. 3:94-3415-17BC

Plaintiff,

v.

(Filed
February 20, 1996)
(Entered 2-21-96)

GOODYEAR AUTO SERVICE CENTER,
a Division of the Goodyear Tire
and Rubber Company,

Defendant.

ORDER

Rubin Martin, pro se, has brought this action alleging that the defendant negligently installed some used tires on his vehicle. His compliant alleges that after he left defendant's premises a wheel came off causing him personal injury. A hearing was held on February 15, 1996, to address several motions. At that hearing, the parties consented to proceed with trial before the undersigned and trial was scheduled for April 1, 1996, at 10:00 a.m. Further, defendant stipulated liability, i.e., negligent mounting of the wheel. Plaintiff stipulated that he did not seek property damage for the vehicle, but only damages for his personal injuries resulting from the negligent mounting of the wheel. The trial, therefore, will be limited to damages for plaintiff's alleged personal injuries. Since no demand has been made pursuant to Fed.R. Civ. P. 38(b), the trial will be held before the undersigned without a jury.

One of the motions addressed at the hearing of February 15, 1996, was defendant's petition for appointment of a guardian ad litem

for plaintiff. The complaint alleges that the incident with defendant caused a relapse of pre-existing substance abuse problems which resulted in plaintiff's being hospitalized. Defendant's motion states that plaintiff has been difficult to deal with and that "this case has reached the point where the Defendant is spending large sums of legal fees to defend itself against frivolous claims due to the Plaintiff's inability to comprehend the nature and extent of his legal rights and obligations in this matter." Defendant has attached a report of John M. Taylor, a Ph.D. in Neuropsychology, to its motion. Dr. Taylor examined plaintiff on March 7, 1994, after a referral from Charter Rivers Hospital. The report indicates neurological deficiencies associated with a head injury in approximately 1978. Dr. Taylor concludes:

> Mr. Martin was alert and oriented. He performed normally on tests of attention and language. Mental control was borderline. He demonstrated mild impairment on self-regulation and monitoring and visual spatial processing. Significant impairment was noted in learning and memory for both verbal and nonverbal information. Current level of intellectual functioning is in the borderline range.
>
> Current level of neuropsychologic performance is consistent with abnormal mental decline. The pattern of performance is consistent with the long term consequence of traumatic brain injury.

Rule 17(b), Fed. R. Civ. P. states in part:

> The capacity of an individual . . . to sue or be sued shall be determined by the law of the individual's domicile.

Subsection(c) of the rule allows the court to appoint a guardian ad litem for an incompetent litigant. Plaintiff is domiciled in South Carolina so the law of this state must be considered.

In Grapner v. Atlantic Land Title Company, 416 S.E.2d. 617 (S.C. 1992), the court held:

> It is not necessary to prove mental incompetence by an adjudication of incompetency. Conversely, an adjudication of incompetency is but prima facie evidence of that fact. Mental incompetence is established by credible evidence that the subject, because of mental impairment, has become incapable of managing his own affairs. . .The party alleging incompetence must prove by a preponderance of the evidence that he was incompetent.
> (Citations omitted).

Accord Hudnall v. Sellner, 800 F.2d 377 (4th Cir. 1986).

At the hearing, the Court questioned plaintiff, under oath, at length about his ability to manage his own affairs. Plaintiff admitted that he suffered a service related head injury which resulted in his receiving disability payments from the Veteran's Administration and the Social Security Administration. However, plaintiff stated that he maintained a checking account and a savings account without help. He also indicated he was presently enrolled in school, was not under the care of a doctor, was not on medication, and had never been ruled incompetent by any court.

Based on the record, the court concludes that even though plaintiff has some difficulties, he is not incompetent under South Carolina law. Defendant's motion is, therefore, **denied.**

AND IT SO ORDERED.

s/ Joseph R. McCrorey
JOSEPH R. McCROREY
UNITED STATES MAGISTRATE JUDGE

February 20, 1996

Columbia, South Carolina

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

RUBEN MARTIN,

C.A. No. 3:94-3415-17BC

Plaintiff,

v.

(Filed
March 8, 1996)
(Entered 3-11-96)

GOODYEAR AUTO SERVICE CENTER, a Division of the Goodyear Tire and Rubber Company,

Defendant.

ORDER

On February 29, 1996, plaintiff filed a pleading captioned "Notice of Appeal." He appears to be dissatisfied with the Court's ruling that he is not entitled to default judgment pursuant to Fed.R. Civ. P. 37 for perceived discovery failure on the part of the defendant. The file has been forwarded to the Fourth Circuit Court of Appeals in Richmond, Virginia for consideration.[1]

1. Plaintiff is advised that he must comply with the Federal Rules of Appellate Procedure to perfect his appeal.

---

[1]On February 15, 1996. The parties consented to a trial before the undersigned pursuant to 28 U.S.C. § 636 with all appeals to the circuit court.

2. The trial of this case scheduled for April 1, 1996, is canceled.

3. Defendant is advised that it is not required to respond to any motion filed in this Court, i.e., United States District Court, unless ordered to do so by this Court.

4. Defendant is advised that it is not required to respond to any further requests pending disposition of the Fourth Circuit Court of Appeals.

5. The trial will be rescheduled after disposition by the Fourth Circuit Court of Appeals.

AND IT IS SO ORDERED.

s/ Joseph R. McCrorey
JOSEPH R. McCROREY
UNITED STATES MAGISTRATE JUDGE

March 8, 1996

Columbia, South Carolina

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

RUBEN MARTIN,

C.A. No. 3:94-3415-17BC

Plaintiff,

v.

(Filed
October 22, 1996)

GOODYEAR AUTO SERVICE CENTER,
a Division of the Goodyear Tire
and Rubber Company,

Defendant.

ORDER

With the consent of the parties, a non-jury trial was held before the undersigned this date. Ruben Martin, Jr., the plaintiff, appeared pro se. Frank Barron Grier, III, appeared for the defendant, Goodyear Auto Service Center, a Division of the Goodyear Tire and Rubber Company ("Goodyear").

Based upon the testimony presented, the undersigned makes the following findings of fact:

1. Martin received a severe head injury in 1975 while a member of the armed services;

2. In about 1983, Martin was granted a 100% service connected disability;

3. On May 28, 1993, Martin took his automobile to Goodyear to have a tire changed;

4. Shortly after leaving Goodyear's premises, the wheel upon which the tire was mounted came off Martin's vehicle while the vehicle was in motion;

5. When the wheel came off, the vehicle fell and came to a stop;

6. This motion of the vehicle jarred Martin's back; and

7. From June 1 through July 7, 1993, Martin was treated by Dr. Sander M. Fields of Fields Chiropractic Clinic for his back injuries. Martin paid Dr. Fields five hundred ninety-five dollars ($595.00) for treatment.

The parties previously stipulated that Goodyear was liable for the wheel coming off Martin's vehicle and that Martin was not seeking damages for injury to his vehicle. After hearing the testimony, the undersigned concludes that Goodyear's negligence was the proximate cause of the injury to Martin's back. Childers v. Gas Lines, Inc., 248 S.C. 316, 149 S.E.2d 761 (1966). The undersigned further concludes that plaintiff is entitled to an award of five hundred ninety-five dollars ($595.00) as damages. The plaintiff offered no admissible testimony that plaintiff's [sic.] negligence was the proximate cause of any other injury or damage.

It is, therefore, ordered that plaintiff shall have judgment against the defendant in the amount of five hundred ninety-five dollars ($595.00).

AND IT IS SO ORDERED.

s/ Joseph R. McCrorey
JOSEPH R. McCROREY
UNITED STATES MAGISTRATE JUDGE

October 22, 1996
Columbia, South Carolina

In accordance with the provisions of 28 U.S.C. § 636 (c) (3), the parties have elected to take any appeal in this case to the United States Court of Appeals for the Fourth Circuit. Should either party wish to appeal this order, a notice of intent to appeal must be filed pursuant to the Federal Rules of Appellate Procedure.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

RUBEN MARTIN,

(Filed October 23, 1996)

Plaintiff,

CA No. 3:94-3415-17BC

VS.

GOODYEAR AUTO SERVICE CENTER,
a Division of the Goodyear Tire
and Rubber Company,

JUDGMENT IN A
CIVIL CASE

Defendant.

( ) **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury having reached its verdict.

(x) **Decision by the Court.** This action came to trial before the Court, Honorable Joseph R. McCrorey, United States Magistrate Judge, presiding and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the plaintiff, Ruben Martin, recover of the defendant, Goodyear Auto Service Center, A Division of The Goodyear Tire and Rubber Company, the sum of Five Hundred Ninety-Five and no/100 ($595.00) Dollars, with interest thereon at the rate of 5.64% as provided by law, and his costs of action.

LARRY W. PROPES, CLERK

s/ Jane Adams
Jane Adams, Deputy Clerk

October 23, 1996
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

RUBEN MARTIN,

Plaintiff,

v.

GOODYEAR AUTO SERVICE CENTER,
a Division of the Goodyear Tire
and Rubber Company,

Defendant.

Case No. 3:94-3415-17BC

Columbia, South Carolina
February 15, 1996
2:35 p.m.

Transcript of Motions Hearing

BEFORE: THE HONORABLE JOSEPH R. MCCROREY, United States Magistrate Judge, presiding.

APPEARANCES:

FOR THE PLAINTIFF: MR. RUBEN MARTIN, PRO SE
P.O. BOX 242
HOPKINS, SC 29061

FOR THE DEFENDANT: FRANK BARRON GRIER, III, ESQUIRE
Grier Law Firm
P.O. Box 4466
Columbia, SC 29240-4466

COURT REPORTER: Pat Fernandez, ESR Operator
United States District Court
1845 Assembly Street
Columbia, SC 29201

TRANSCRIPTION SERVICE: Kelly Weiner & Associates, Inc.
151 Pleasant View Road
Blythewood, SC 29016

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

(Call to Order of the Court.)

THE COURT: Thank you. Take your seats, please. This is a hearing in the case of Martin versus Goodyear Auto Service. It is number 94-3415. Mr. Martin, you are pro se in this case. Is that correct?

MR. MARTIN: Yes, I am, sir.

THE COURT: And, Mr. Grier, you represent the defendant in this case?

MR. GRIER: Yes, sir, Your Honor.

THE COURT: All right. There are several motions pending that I wanted to discuss today, but first let me refresh my recollection. We have had one other hearing in Court -- at least one other hearing in Court on this case. Is that correct?

MR. GRIER: I don't think --

THE COURT: Some time back?

MR. MARTIN: No, sir.

MR. GRIER: No, sir

THE COURT: Have you ever appeared here before --

MR. MARTIN: No, sir.

THE COURT: -- Mr. Martin?

MR. GRIER: No, sir.

THE COURT: Okay. Let's -- I had it confused with some other case, I suspect.

MR. GRIER: Yes, sir.

THE COURT: Mr. Martin, have you received what we call consent forms in this case?

MR. MARTIN: Consent forms? No, I haven't got that. What type of forms were those?

THE COURT: Well, I'm going to ask the Marshal to hand you them.

(Off the record colloquy between Judge and Clerk.)

THE COURT: These are forms that were mailed out at the beginning of the case. I don't normally encourage parties to consent to my jurisdiction in these cases because I have a mountain of other work to do, but let me just. Since you are pro se, Mr. Martin, I'll explain to you that pursuant to Title 28 of the United States Code the parties -- of Section 636, as it says on this form --

MR. MARTIN: Uh-huh.

THE COURT: -- the parties can consent to having their case tried by a United States Magistrate Judge. I am a United States Magistrate Judge. Anyway, this case is assigned to a United States District Judge, Joe Anderson, and me, as a Magistrate Judge, pursuant to our Local Rules. Now, if the parties wish, they can consent and have me do the whole case. Do you recall getting those forms --

MR. MARTIN: No.

THE COURT: -- at the beginning of this case?

MR. MARTIN: No, I never got these.

THE COURT: Okay. Well, I'll just ask you to take a look at that, and --

MR. MARTIN: All right.

THE COURT: -- I'm not attempting to strong arm anyone into consenting to my jurisdiction. You have an absolute right to have your case heard by a United States District Court Judge , but you can consent and have me try the case.

MR. MARTIN: Okay, now, as far as what's going on here now today, this doesn't have any bearings on it?

THE COURT: No, it doesn't have anything to do with today. I have jurisdiction over all pre-trial motions --

MR. MARTIN: Oh.

THE COURT: -- in the case.

MR. MARTIN: Okay.

THE COURT: This would be for a trial of the case or --

MR. MARTIN: With a jury.

THE COURT: -- just for everything else that would go forward. My purpose in giving you these forms and asking you about this is that this is a -- the case was filed back in 1994, and what I'm attempting to do, more or less, is cut out the middle man so that this case can be resolved in a fairly quick fashion. What I would propose to do today, if we can get through this hearing and both sides consent -- you might consent, and Mr. Grier might say no, you know. Both sides have to consent before I can do the case.

MR. MARTIN: Oh, okay.

THE COURT: And the District Court Judge has to consent to it. But what I was planning to do today, if the parties did want to consent, was try to set a trial date.

MR. MARTIN: Yeah, I prefer a trial date because I would like to have a jury hear it, but with the motion that's pending today, it should be resolved today --

THE COURT: Well --

MR. MARTIN: -- as far as the motion is concerned.

THE COURT: -- absolutely. I intend to --

MR. MARTIN: Okay.

THE COURT: -- resolve all of the pending motions --

MR. MARTIN: Okay. Well --

THE COURT: -- today.

MR. MARTIN: Well, I --

THE COURT: But this has to do with whether or not I can set a trial date is the bottom line.

MR. MARTIN: I would prefer a trial, if we can.

THE COURT: Now, with respect to your statement that you would like to have a jury resolve this case, I have reviewed this file in some detail today with that question in mind --

MR. MARTIN: Uh-huh.

THE COURT: -- and I don't see any demand for a jury trial anywhere in the case.

MR. MARTIN: Oh. Well, I'm new at this, so --

THE COURT: Well, I understand that.

MR. MARTIN: Okay. Okay.

THE COURT: But the Federal Rules require that a demand for a jury trial be made in a timely fashion and so many days after the filing of an answer, and that has not been done, so basically, there will be no jury trial in this case. It will be tried by a judge. It will be tried by either me or Judge Anderson.

MR. MARTIN: Okay.

THE COURT: Mr. Grier, do you know of any demand for a jury trial?

MR. GRIER: No, sir.

THE COURT: Did I miss anything?

MR. GRIER: No, sir.

THE COURT: Okay.

MR. MARTIN: Okay. In that case, if a jury trial is not in order, then you seem to be a pretty fair Judge, here, so, I mean, I like the tone of your voice anyway, and so, you know, the consent will be okay because I don't really know the other person, the other Judge, so --

THE COURT: Well, I mean, it's entirely up to you. I'm not trying to force you into doing it, but --

MR. MARTIN: Yeah, I know. I really don't have a wide range -- I mean, I wanted a jury trial, but since that's not possible, I'll just consent. It's okay.

THE COURT: All right.

MR. MARTIN: Uh-huh.

THE COURT: If you so desire, if you will sign the consent form there --

MR. MARTIN: Okay.

THE COURT: -- on page two, consent to proceed before a United States Magistrate Judge? Now, you also have another option there for an appeal. Both sides have the option. You can appeal to the Fourth Circuit Court of Appeals or to the United States District Court Judge. For your information, Mr. Martin -- well, I'll let you read through that before we go any further.

MR. MARTIN: Okay. Let me -- I've got to read this first page here, too, and --

THE COURT: All right. And it says:
"Attorney for plaintiff."

You can strike out attorney for, and sign it plaintiff, pro se, if that's your decision.

MR. MARTIN: Okay.

(Pause, as Mr. Martin executes document.)
(Off the record colloquy among counsel.)

MR. MARTIN: Okay, I think I have that right.

THE COURT: All right. I'm going to ask the Marshal to hand it up.

MR. GRIER: I don't think I've got to sign but one of them. No, that's the one I did sign.

MR. MARTIN: Oh, I signed it on that one.

MR. GRIER: No, that's okay. You've got to sign of them.

MR. MARTIN: Oh, both of them?

MR. GRIER: Yes.

MR. MARTIN: All right.

THE COURT: All right. Mr. Martin, I'm going to hand you -- well, I seem to have a divergence of opinion here. Mr. Grier has signed the appeal option in both places to the Court of Appeals. Mr. Martin, you appear to have signed one of these copies for the Court of Appeals and one for an appeal to the District Court Judge. In other words, you signed both of them, but you signed them in different places. I'm going to ask you to hand these back to Mr. Martin. Now, the first signatures are the consent part.

MR. MARTIN: All right.

THE COURT: The second part of the form is --

MR. MARTIN: Oh, I see.

THE COURT: -- where the appeal would go. You have the option of going to the Court of Appeals or to the District Court Judge.

MR. MARTIN: Okay. And I can scratch through this?

THE COURT: Yes, sir, if that's your decision. All right. The Marshal is getting her exercise today. Thanks. All right, very good. Now, that takes care of that, and we'll go through these motions, and we'll talk about a convenient trial date. Mr. Martin, I can say that generally, when lawyers consent to a Magistrate Judge trying a case it's for their own convenience. We don't have trial dockets the same way the District Court Judges have trial dockets --

MR. MARTIN: Uh-huh.

THE COURT: -- with jury panels coming in, and they have twenty-five cases to try over a three week term --

MR. MARTIN: Uh-huh.

THE COURT: -- and they are jammed up. I don't maintain a trial docket, as such, so when a case is consented to be tried before me I can schedule it at the convenience of the parties because I don't have to worry about jury panels and other lawyers. I only have one case at a time, which is --

MR. MARTIN: Okay.

THE COURT: -- which is an advantage. So, all right, the first motion that I have was filed by the plaintiff, Mr. Martin, on September 27th, and it is styled as a motion for default, but it cites Rule 37 of the

Federal Rules of Civil Procedure, which are the -- that rule contains the sanctions for failure to engage in discovery properly. Mr. Martin, a default occurs, under the Federal Rules of Civil Procedure, where you file your complaint and properly serve it on the defendants, and they don't properly respond to the complaint. In other words, they don't file an answer to the complaint. That would be a default. In other words, if they don't come in and appear after they have been served, the rules allow the Court to enter a default judgment at that point. Now, the defendants have answered in this case, so a default would not be proper; however, what you have apparently tried to allege in this motion is that the defendants have not properly responded to discovery requests.

MR. MARTIN: Yes.

THE COURT: Now, if that appears under Rule 37 they may be subject to sanctions, one of which, the most extreme sanction would be to grant you judgment and then go on to a damages hearing. So, let me hear what you are complaining about, or what you think the defendants owe you with respect to this motion.

MR. MARTIN: Okay. Well, what I'm complaining about is that the Court had set aside certain dates in order for us to have the discovery, and --

THE COURT: Right. We issued some scheduling orders in this case.

MR. MARTIN: Yes. And they did not comply with those scheduling orders.

THE COURT: All right. How did they not comply with the scheduling orders?

MR. MARTIN: They do not file anything before August 31st as to any motions or the interrogatories and production that I filed to the plaintiff -- or to the defendant, rather.

THE COURT: All right. All right, you filed some discovery requests, or served some discovery requests on the defendants?

MR. MARTIN: Yes, sir, I did.

THE COURT: All right.

MR. MARTIN: And -- yes --

THE COURT: All right.

MR. MARTIN: -- some discovery and the interrogatories.

THE COURT: Did they respond to those discovery requests?

MR. MARTIN: They did, but it was after that Court ordered date of August 31st.

THE COURT: All right. Well, I think what we're talking about here may be two different things. The scheduling order called for an end of discovery on August the 31st. Is that correct --

MR. GRIER: I think that's right.

THE COURT: -- Mr. Grier?

MR. GRIER: I think that's right.

THE COURT: What --

MR. GRIER: See, I'm --

THE COURT: Go ahead --

MR. GRIER: Could I interrupt?

THE COURT: -- Mr. Grier. Yes, sir.

MR. GRIER: The -- it may be good to take my motion out of order, because it really is going to affect all of the rest of them, but what -- where we got delayed was that when I served him with my interrogatories he objected and said I was harassing him, and they were just standard interrogatories.

THE COURT: All right.

MR. GRIER: And they weren't long or anything else. And then he made a motion to get me to quit harassing him by asking him to answer these interrogatories, and he never has answered the 16(b) interrogatories. And -- and so we more or less said when you give us the information, since you are the plaintiff, we'll respond to yours, and I think that's the way it normally works, and -- but, Your Honor, you have to understand this is a different case, and it's always different when you've got a pro se plaintiff --

THE COURT: Right.

MR. GRIER: -- but it's particularly problematic in this instance, and it's not that --

THE COURT: All right. What --

MR. GRIER: -- not that he is not a very nice person. We met in the hall, and we talked. He's a good guy. But he just doesn't understand --

THE COURT: Well --

MR. GRIER: -- the procedures, and I'm sorry for that.

THE COURT: -- Mr. Martin, I -- I deal with pro se cases every day. Under the Local Rules, we get all of the pro se cases, and I must get at least one case a day from an inmate who is pro se, so I understand that most pro se litigants don't have a full comprehension of the Rules of Civil Procedure, and that causes some problems.

MR. MARTIN: Yes, sir.

THE COURT: What information, specifically, were you looking for from the defendants?

MR. MARTIN: I get -- let's see. I have a -- what I mailed to them, as far as what I thought it was, interrogatories and production to the defendant.

THE COURT: All right. And --

MR. MARTIN: And they did not --

THE COURT: they served some interrogatories on you, is --

MR. MARTIN: Yes. And I --

THE COURT: -- that correct?

MR. MARTIN: And I responded back to them with the answers to their interrogatories --

THE COURT: All right.

MR. MARTIN: -- and production.

THE COURT: That was after I signed an order?

MR. MARTIN: Yes.

THE COURT: Mr. Grier filed a motion to compel?

MR. GRIER: That's right.

MR. MARTIN: Right. That's right.

THE COURT: All right. All right, you have not filed a motion to

compel, as far as I can see. Is that correct?

MR. MARTIN: Uh --

THE COURT: A motion to compel production? Well, I have three motions pending on my docket, the motion for default, then a statement that was filed by you to clarify Rules 7.04 and 7.06. I don't even know that that's a motion, but it has been docketed as a motion. And then defendant's motion for appointment of a guardian ad litem.

MR. MARTIN: Okay. Now, I saw no need to file a motion to compel, since the Court had already set aside the dates ordered for us to have everything in by that certain particular date, so I felt like there wasn't any need for that --

THE COURT: Well --

MR. MARTIN: -- a motion to compel.

THE COURT: -- the only thing that the discovery cut-off does is that you have to file your discovery with the other party by that date.

MR. MARTIN: All right.

THE COURT: It does not mean that they have to necessarily reply by that date. So, as far as your motion for default, I'm going to have to deny that, okay? Now, tell me about your motion to clarify, or your statement about clarifying. That also had to do with discovery.

MR. MARTIN: Uhm --

THE COURT: Was that intended to be a motion, or was that a statement by you to clarify what you meant?

MR. MARTIN: I think that's what it --

THE COURT: Well, let me --

MR. MARTIN: -- it involved.

THE COURT: That's the way I read it, even though it was docketed as a motion.

MR. MARTIN: I don't really have it right here in front of me.

THE COURT: I've got it. It was filed September

I certify that the foregoing fifty-four (54) pages is a true and correct transcript from the electronic sound recording of the proceedings in the above-entitled matter and is transcribed to the best of my ability.

s/ Kelly Ann Weiner
Transcriber

March 31, 1996
Date

RICHARDSON, PLOWDEN, GRIER & HOWSER, P.A.
ATTORNEYS AND COUNSELORS AT LAW

COLUMBIA OFFICES
1600 MARION STREET
P O DRAWER 7788
COLUMBIA, SOUTH CAROLINA 29202
(803) 771-4400
TELECOPY (803) 779-0016

December 28, 1994

REPLY TO:
Columbia

VIA CERTIFIED MAIL

Mr. Ruben Martin
Post Office Box 242
Hopkins, SC 29061

Re: Ruben Martin v. Goodyear Auto Service Center, a Division of the Goodyear Tire and Rubber Company
Civil Action No: 3:94-3415-17
Our File No: 194-010

Dear Mr. Martin:

Enclosed for service upon you by mail is the Acknowledgment of the Filing of Copy of Notice of Removal for your file.

Sincerely,

s/F. Barron Grier, III
F. Barron Grier, III

FGB/cbr
Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

RUBEN MARTIN,

Plaintiff,

v.

GOODYEAR AUTO SERVICE CENTER, a Division of the Goodyear Tire and Rubber Company,

Defendant.

CIVIL ACTION NO. 3:94-3415-17

ACKNOWLEDGMENT OF THE FILING OF COPY OF NOTICE OF REMOVAL

(Richland County No: 94-CP-40-3990)

Receipt of a copy of the Notice of Removal and Answer to Amended Complaint and Demand for Jury Trial in the above-entitled action is hereby acknowledged this 20 day of December, 1994.

s/ Barbara A. Scott
Barbara A. Scott
Richland County Clerk of Court

STAMPED: "RECEIVED/U.S. DISTRICT COURT
DEC 28 11 22 AM '94"